

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

R. DOE

v.

FOSTER SCHOOL COMMITTEE

DECISION

Held: The Foster School Department may provide Student Doe with the speech and language services described in his current Individualized Education Program at the Captain Isaac Paine School rather than at the private school he attends in Richmond. However, if the Foster School Department does so, it must provide Student Doe with transportation (a) from his private school or home to Captain Isaac Paine School; and (b) from Captain Isaac Paine School to his private school or to his home, depending on the timing of the services. The Interim Order Decision dated November 16, 2010 is maintained in effect pending any appeal of this decision.

DATE: August 26, 2011

Travel of the Case:

This matter was originally heard on a request for issuance of an interim protective order. An interim order decision, requiring the Foster School Department to continue to provide Student Doe with speech/language services pursuant to his current Individualized Education Program (“IEP”), was issued on November 16, 2010. Thereafter, on November 18, 2010, counsel for Student Doe’s parents (the “Petitioners”) filed a request for a hearing under R.I.G.L. 16-39. The matter was heard on December 13, 2010 at which time testimony and documentary evidence were taken. Counsel for both parties filed briefs summarizing their arguments, with the final brief filed by agreement of the parties on May 2, 2011.

Jurisdiction is predicated on R.I.G.L. 16-39-1, “Appeal of matters of dispute to commissioner.” A threshold issue in this case was jurisdiction, which was resolved in favor of the Petitioners. Counsel for the school district questioned the Commissioner’s jurisdiction because at the time of hearing the Petitioners had already withdrawn their request for a due process hearing. The district implicitly argued that the Petitioners were seeking to divert issues related to special education away from a due process hearing officer and the appropriate process for resolving disputes under Board of Regents’ Regulations Governing The Education Of Children With Disabilities. The district’s challenge required counsel for the Petitioners to clearly identify the nature of the claims asserted before the hearing officer and the basis of the Commissioner’s jurisdiction to hear them.

The Petitioners’ argued that their claims presented a case of first impression under R.I.G.L. 16-24-1, “Duty of school committee to provide special education.” Student Doe’s claim for special education services at the private school in which he is enrolled by his parents thus presents state-specific issues under a heretofore untested state law that extends rights to a free appropriate public education to private school students in Rhode Island. The Commissioner clearly has jurisdiction to decide the Petitioners’ claims as well as the responsibility to enforce the provisions of this law.

Counsel for the Petitioners also argues that the Rhode Island Supreme Court ruled in the case of In Re Michael C., 487 A2d 495 (R.I. 1985), that parents of students with disabilities could avail themselves of review procedures available under state education law without contravening the Individuals With Disabilities Education Act (IDEA). It was the hearing officer’s conclusion, based on In Re Michael C and also based on the 1996 decision of the Commissioner In the Matter of Jane A.H. Doe (April 4, 1996), that the Commissioner has jurisdiction to hear and decide this dispute.¹

¹The Commissioner typically requires the parties first to submit their dispute to the School Committee for resolution. See In the Matter of Jane A.H. Doe, supra. We assume that the Foster School Committee was apprised of the issues by its counsel and that it was informed of the Interim Order Decision entered in this case. We also assume that a hearing before the School Committee would have been futile.

ISSUES:

- In providing Student Doe with a free appropriate public education in accordance with R.I.G.L. 16-24-1, does the Foster School Committee have the option of providing services at either the site of the private school he attends in Richmond or at the Captain Isaac Paine School in Foster?
- If the Foster School Committee elects to provide services at the Captain Isaac Paine School rather than on-site at his private school, is it required to provide Student Doe with transportation to and from the service location?

Findings of Relevant Facts:

- Student Doe resides with his family in the town of Foster, Rhode Island and is enrolled at the Meadowbrook Waldorf School in Richmond, Rhode Island. At the time of the hearing he was in third grade. Tr. pp. 11-14.
- Student Doe is a student with a disability who receives special education services. His current Individualized Education Program (“IEP”) was developed for him by the Foster School Department and calls for him to receive speech and language services twice per week and specialized reading instruction five days per week. These IEP services have been provided to Student Doe on-site at his private school; Foster pays for the speech/language therapy component of the IEP and Chariho provides the specialized reading instruction through a “services plan.”² Tr. p.13; Foster Ex.4.
- Student Doe was re-evaluated in the spring and early fall of 2010. These evaluations indicated that Student Doe’s academic progress has been limited³ and that he continues to experience significant language-based learning difficulties. It was recommended that in addition to ongoing speech and language services, Student Doe receive more intensive, multi-sensory language-based reading instruction, such as that provided through the Orton Gillingham method. It was also recommended that he receive extended school year services. Foster Ex.5 and 8.
- At a pre-IEP meeting with Student Doe’s parents on September 8, 2010, Foster special education staff proposed to change the site of Student Doe’s speech and language therapy to the Captain Isaac Paine School in Foster. This proposal was based on what the Director of Special Education perceived as significant regression in Student Doe’s performance in core academic areas as well as in speech and language. Tr. pp. 81-87. Foster’s Director of Special Education testified that the private school was not generating the type of growth that he would expect and that the proposal (to change the site and provider of speech/language therapy) was made

² The parties are in agreement that the Foster IEP’s reading instruction services for Student Doe will continue to be provided through a services plan provided to him by the Chariho school district.

³ The pediatric neuropsychologist who evaluated Student Doe on March 26, 2010 found that “In general, results of neuropsychological testing reflected progress, although the degree of progress was somewhat less than expected.” Foster Ex.5 at page 7.

in response to these concerns. If Student Doe receives speech and language services at the Captain Isaac Paine School, staff there will be able to see him on a regular basis and ensure that his growth is continuing. Tr.pp.86-88.

- The special educator who provides reading instruction⁴ to Student Doe under his services plan from the Chariho School Department testified that according to progress tests she administered to him, he has made great progress during this school year, especially in the area of phonemic awareness. Tr. pp. 74-76. The resource coordinator at his private school testified that despite his significant learning disabilities, Student Doe is clearly making progress. Tr. pp. 54-55. When asked about his progress, Student Doe's mother testified that her son "is a very happy child...he's an extremely confident happy child in that school system. He sees himself as doing extremely well. His self-esteem is very high." Tr. pp. 19-20. The comments of the pediatric neurologist who evaluated him on March 26, 2010 were that despite significant language-based learning challenges, "(Student Doe) remains a very upbeat and well-adjusted young boy." Foster Ex. 5 at page 8.
- If Student Doe were to receive speech and language therapy at the Captain Isaac Paine School, these services could be made compatible with his private school program by scheduling them for Thursday afternoons when Student Doe's private school is not in session. Tr. pp. 88-89. The district would be willing to provide him with transportation from the Captain Isaac Paine School to his home, but not from his private school in Richmond to Foster. Tr. pp.88-91.

Positions of the Parties:

The Petitioners:

Counsel for the Petitioners focuses his arguments on R.I.G.L. 16-24-1 and 16-24-4. He argues that these provisions of Rhode Island law clearly entitle students with disabilities who are placed by their parents in private schools to a free appropriate public education ("FAPE") and such transportation as may be necessary to be provided by their resident districts. The definition of "free appropriate public education" under both federal and state regulations includes both special education and "related services". "Related services" according to federal and state regulations means "transportation when it is required to assist a child with a disability to benefit from special education."⁵ A parent whose child is found to be in need of special education and who is entitled to FAPE has no obligation to transport him or her if transportation is needed in order for him to benefit from special education. Thus, if Foster wishes to provide speech and language services at the Captain Isaac Paine School rather than on-site at his school in Richmond, it must provide the transportation necessary for him to get there.

⁴ She uses the Orton-Gillingham program, in which she has received extensive training.

⁵ Counsel cites 34 CFR 300.17 and 300.17 of the Board of Regents Regulations Governing the Education of Children with Disabilities (R.I. Regulations) with respect to the definition of FAPE and 34 CFR 300.34 (c)(16) and R.I. Regulations 300.34 (c)(16) for the definition of related services.

In 2008 the Rhode Island General Assembly affirmed a policy decision to continue to require the district of the child's residence to provide FAPE to parentally-placed students with disabilities. This decision was made some ten years after federal special education law ("IDEA") had been amended to eliminate entitlement to FAPE of students enrolled by their parents in private schools. Despite significant cost implications, our General Assembly essentially rejected the principle (that had been codified in federal law) that parentally-placed students would merely equitably participate in the Part B program of the district in which their private school was located. According to counsel for the Petitioners, Foster's argument that it has no obligation to transport Student Doe from Richmond to the Captain Isaac Paine School clearly violates the FAPE obligation imposed on his district of residence under state education law.

The Petitioners dispute the notion that Chapter 16-21.1, entitled "Transportation of School Pupils Beyond City and Town Limits", and its establishment of five transportation "regions" can eliminate the transportation Student Doe will require to access special education. This statute does not, the Petitioners submit, place "regional" limits on a district's transportation obligations when the transportation is a related service required in order to provide a student with FAPE. To support this argument, the Petitioners note the language of R.I.G.L. 16-21.1-7, "Statewide transportation of students with special needs," which uses the phrases "notwithstanding the regional structure created in this chapter" and "pursuant to the obligation of school committees to transport children with special needs." This language confirms the statewide nature of the transportation obligations to students with disabilities.

The Petitioners dispute the validity of Foster's decision to change the site of speech therapy services from his private school where they are conveniently and efficiently provided now. The language used in the statute requires that FAPE be provided to private school students at the site of their private schools. R.I.G.L. 16-24-1(c) indicates that parents who unilaterally enroll their child in a private school are required to pay tuition costs that are unrelated to the child's disability, and:

...the public school district where the child resides is responsible for payment of the services related to the child's disability as developed and determined in the child's individual education plan.

When these 2008 amendments to R.I.G.L. 16-24-1 were made, Board of Regents' Regulations explicitly stated that districts had the option of providing IEP services to parentally-placed children on the site of the private school or at some other service site. This language was removed when the Board of Regents' promulgated new Regulations effective July 1, 2010. Specifically omitted from the current regulations is the discussion of "location of services" and "transportation" with respect to the district of residence's

provision of FAPE to students enrolled by their parents in private schools.⁶ The conclusion to be drawn is that the law and Regulations are now consistent and require that FAPE be provided on-site at the private school and “paid for” by the district of residence.

In his reply brief, Counsel for the Petitioners notes that the regulation cited by Foster as the source of its authority to utilize its “sole discretion” in choosing the site for services is Part VI of Section 129. Counsel points out that this section was deleted from the current regulations. Also, the case cited by the district as additional support for the same proposition, Bristol Warren Regional School District v. R.I. Department of Education, et al, 253 F.Supp. 2d 236 (D.R.I. 2003), is not applicable. That case involved providing a private school student with a “services plan” (not FAPE) under prior federal law.⁷

The Petitioners point out that continuing to provide speech therapy services to Student Doe at his private school in no way lessens the ability of the school district to supervise and direct services through the IEP process. In fact, Foster has been working in collaboration with his service providers and teachers to ensure that his rate of academic progress increases. The success and confidence that Student Doe has maintained will be undermined if his school day is disrupted to transport him to another site for speech and language therapy. The goal should be that his school day will have minimal interruption. Foster should not be authorized to provide some of his FAPE services at the Captain Isaac Paine School because this is clearly not in Student Doe’s best interests. His school day will be disrupted and he will be required to spend as much as an additional hour travelling from his private school to the service site.

For the foregoing reasons, the Petitioners request that Foster be ordered to continue to provide speech and language services at Student Doe’s private school, or, in the alternative, be required to provide transportation from his private school to the service site and from there, to his home.

Foster School Committee:

Counsel for the District argues that the fundamental issue in this case is whether a student who seeks a free and appropriate public education pursuant to R.I.G.L. 16-24-1 can

⁶ The current Board of Regents’ Regulations (effective July 1, 2010) deleted the discussion of “Location of services; transportation” previously found in Section 300.129 VI of the Board of Regents Regulations (effective July 1, 2008) from Section 300.129 “FAPE for Children with Disabilities Enrolled By Their Parents in Private Schools.”

There is, however, a discussion of “location of services and transportation” in Section 300.139 of the current Regulations (effective July 1, 2010) as these subjects relate to implementation of services plans and the equitable participation of parentally-placed private school children with disabilities in the Part B program of the district in which their private school is located.

⁷ At the time Bristol Warren v. RIDE, supra, was decided, 20 U.S.C. § 1412(a)(10)(A) and (C) required states to provide “some measure of special education and related resource services” to children in private schools.

demand that the services be provided at the private school chosen by his parents. If not, can the parents alternatively demand that the public school district transport the child from his school to the location where the services will be provided. Foster would answer both of these questions in the negative.

The private school selected by Student Doe's parents is located in Richmond, Rhode Island. Richmond is outside the transportation region – Region II – in which Foster is placed. The legislative purpose in establishing regions was to promote the public health and safety by providing transportation services for students who live at a distance from their schools, but with reasonable geographic limitations. The General Assembly sought to avoid the constitutional prohibition of advancing religion by ensuring that the benefits to private school students do not exceed those provided to students in public schools.

R.I.G.L. 16-21.1-2(a) specifically applies to students attending nonpublic nonprofit schools, as well as to those enrolled in vocational and special education schools. This law creates “regions” limiting transportation obligations to students in private schools and, despite the argument of the Petitioners that this regional structure was abrogated by the passage of R.I.G.L. 16-21.1-7, these regions have not been abrogated. The sole purpose of the enactment of 16-21.1-7 in 2006 was to authorize the Rhode Island Department of Elementary and Secondary Education to develop a statewide system of transportation for students with special needs. It was not the intent of the General Assembly to expand transportation obligations beyond well-settled transportation regions.

The district submits that any obligation it may have to transport Student Doe is governed by Part VI of Section 129 of the Board of Regents' Regulations, which states:

(b) Transportation:

- (1)(i) If necessary for the child to benefit from or participate in the services provided under this part, a private school child with a disability must be provided transportation-(A) From the child's school or the child's home to a site other than the private school; and (B) From the service site to the private school, or the child's home, depending on the timing of services.

Based on the above-cited regulation and the Court's decision in Bristol Warren Regional School District v. R.I. Department of Education, et al., supra, Foster clearly has the prerogative to provide speech and language therapy services to Student Doe at the Captain Isaac Paine School.⁸ The district argues that it will fully comply with the law by providing him with transportation home after he receives speech and language services

⁸ His private school is not in session on Thursday afternoons and testimony from Foster's Director of Special Education was that services could be scheduled for Thursday afternoons.

there. In light of the recent evaluations of Student Doe's academic progress, there is a clear rationale for changing the manner in which he currently receives services.

As soon as an IEP meeting can be held and the specifics of the plan discussed with his parents, the district requests that the Interim Protective Order entered on November 16, 2010 be lifted and the appeal be denied and dismissed.

DECISION

In 2008 the Rhode Island General Assembly made substantial changes to R.I.G.L. 16-24-1, entitled "Duty of school committee to provide special education". In clear language dispersed throughout three new subsections of the law, the General Assembly established an unconditional entitlement to a free and appropriate education⁹ for students with disabilities unilaterally placed by their parents in private schools. The logistics of providing "FAPE" to private school students who might attend schools located outside of the district of residence, schools beyond the district's transportation region and even schools located far beyond the district's boundaries are not directly addressed in the amendments to the statute. Hence, this dispute arises and it presents a case of first impression under state law.

The Petitioners argue that the last sentence of R.I.G.L. 16-24-1 (c) should be interpreted to require districts of residence to provide FAPE to private school students at the site of their school. The language in subsection (c) is as follows:

Parents who unilaterally enroll their child in a private school are required to pay the tuition costs related to the child's education that are unrelated to the child's disability, and the public school district where the child resides is responsible for payment of the services related to the child's disability as developed and determined in the child's individual education plan.

The Petitioners contend that the above-cited language of the statute, coupled with the removal of language previously found in Section 300.129 VI of the Regulations,¹⁰ evidences a legislative intent to require districts of residence to pay for FAPE services provided on site at private schools. Although the Petitioners' interpretation is not an unreasonable one, it is not the interpretation we would make for the following reasons.

⁹ A free and appropriate education is defined in subsection (d) of 16-24-1. The definition includes special education services and related services that are provided at public expense, under public supervision and direction, and without charge;

¹⁰ The deleted language related to the option to provide private school children with services on-site at the private school and a section on transportation obligations.

If the drafters of the 2008 amendments to R.I.G.L. 16-24-1 contemplated that in every instance the district of residence could fulfill its responsibility to provide FAPE only by paying for the cost of services at the private school that were “related to the child’s disability,”¹¹ it would have been an easy matter to say so. There are a number of other references in the statute to the district of residence’s obligation to “provide” special education and related services pursuant to the child’s individual education plan. The drafters of this law are presumed to know the difference between the words “provide” and “pay for”, and we would note that both terms are used in the extensive changes to 16-24-1 that were effectuated in 2008.

The Board of Regents’ Regulations Governing the Education of Children With Disabilities were amended subsequent to these legislative changes and the regulatory amendments took effect on July 1, 2010. Section 300.129 of the Regulations addresses the subject of “FAPE for Children with Disabilities Enrolled By Their Parents in Private Schools”. The language throughout Section 300.129 refers to the obligation of the LEA of residence to “provide” FAPE and to ensure that an IEP for the parentally-placed child is developed and implemented. The logistics of how this may be accomplished by the district of residence are not spelled out.

It is true that Section 300.129 no longer contains the language formerly in Section 300.129 VI entitled “Location of services; transportation”. In the prior version of the Regulations, Section 300.129 VI spelled out the option of an LEA to provide services on-site at a child’s private school, including a religious school. This section also described specific requirements for transportation when private school children were not serviced on-site at their private school. The reason for the deletion of this language is not altogether clear and it may have been an oversight.¹² We do not agree, however, that the elimination of language that explicitly established an LEA’s option to provide services on-site at the private school takes away the LEA’s prerogative to provide services directly to the child utilizing its own special educators at a site within the district.

The district’s argument that Student Doe’s mother is obligated to transport him to the site at which Foster proposes to provide services- the Captain Isaac Paine School in Foster- lacks merit. When an LEA proposes to provide special education services at a site located beyond a reasonable walking distance from the private school the student attends, it must provide transportation as a “related service” under Section 300.34 of the Board of Regents’

¹¹ This intent would have been more clear if the statute indicated that the district of residence was responsible for that portion of tuition attributed to the cost of services related to the child’s disability.

¹² Almost identical language to that deleted from 300.129 is found in 300.139 which discusses “Location of services and transportation” when districts in which private schools are located satisfy the requirement that students with disabilities enrolled by their parents in private schools equitably participate in their Part B Program. Implicitly, the provisions of 300.139 would apply to districts obligated under state law and regulations to provide FAPE to resident students who are enrolled by their parents in private schools.

Regulations.¹³ Again, although it is unclear why the July 1, 2010 Regulations deleted language formerly in Section 300.129 VI (b) (“Transportation”), the language of that section can be found at Section 300.139 of the Regulations and implicitly governs transportation when an LEA opts to provide FAPE for its resident students at a site other than the student’s private school.

The requirement to provide Student Doe with transportation as a related service under R.I.G.L. 16-24-1 is not negated by the fact that the school he attends is located in Richmond, outside of Foster’s transportation region (Region II) under R.I.G.L. 16-21.1-2. The statutory requirement that Foster provide Student Doe with a free appropriate public education overrides the limitations placed on districts’ transportation obligations as they exist under the regional transportation system created in 16-21.1-1 et seq. The alternative to transporting Student Doe back to Foster for FAPE services is to continue to provide them at his private school in Richmond, as his parents have requested.

For the foregoing reasons, the Petitioners’ appeal is granted in part. If Foster determines that it will provide speech and language therapy to Student Doe at the Captain Isaac Paine School, it must provide him with transportation there from his private school in Richmond and from the Captain Isaac Paine School to his home in Foster. During the period of any appeal of this decision or period in which this decision is not a “final” decision, the interim order entered on November 16, 2010 is hereby continued in full force and effect.

For the Commissioner,

Kathleen S. Murray

Deborah A. Gist, Commissioner

August 26, 2011
Date

¹³ As counsel for the Petitioners has also pointed out, Section 300.902 of the Board of Regents’ Regulations has a separate discussion of transportation as a “free transportation...to provide the services required in the child’s IEP.”